

# Reforming and Clarifying the Products Liability Statute of Repose

By Burton Craige

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On August 24, 2003, Elaine Gorski, a long-time resident of Carrboro, North Carolina, was riding as a passenger in her 1997 Chevy Blazer on a rural highway in Chatham County. The right wheels briefly left the pavement, and when the driver tried to return the vehicle to the highway, the SUV rolled over twice, buckling the roof on the passenger side. The roof struck the top of Elaine's head, causing a permanent spinal injury and quadriplegia.

Within days of the accident, Elaine's husband consulted Jay Trehy, a Raleigh lawyer and friend of the family. From his work on another case, Jay knew that many drivers and passengers had been catastrophically injured or killed in similar rollover accidents involving the Chevy Blazer. He also knew that General Motors had paid substantial settlements based on evidence that the accidents were caused by known defects in the design of the SUV.

All this gave hope to Elaine and her family. With a strong negligence case against the manufacturer, she appeared to have a good chance of obtaining a settlement that would provide at least partial compensation for her catastrophic losses.

## **Current Law: Harming North Carolina Citizens, While Protecting Negligent Out-of-State Manufacturers**

There was just one problem. Jay determined that the SUV was first sold seven years before Elaine's accident. Under North Carolina's statute of repose for products liability cases, N.C.G.S. § 1-50(a)(6),<sup>1</sup> enacted in 1979, an injured person must file suit within six years of the date of the initial sale of the allegedly defective product. Because the product failed more than six years after it was sold, Elaine was barred from pursuing a claim against General Motors.

If Elaine had lived anywhere else in the United States, she could have brought suit against the SUV manufacturer. Thirty-three states and the District of Columbia have no statute of repose for products liability actions.<sup>2</sup> Four states establish a presumptive ten- or twelve-year statute of repose that can be rebutted by evidence that the "useful safe life" of the product is longer or shorter.<sup>3</sup> Two states establish a rebuttable presumption of no negligence if the product was first sold more than a certain period of time before the injury.<sup>4</sup> Ten states have a fixed statute of repose that is significantly longer than North Carolina's, ranging from ten to fifteen years.<sup>5</sup> That leaves North Carolina as the lonely outlier. Saddled with an inflexible six-year statute of repose,<sup>6</sup> North Carolinians have less protection against defective products than any other United States citizens.

North Carolina's harsh law has a direct and devastating impact on individuals who are barred from recovering compensation for their injuries. The law also harms North Carolina businesses and public agencies that routinely pick up the bill for damages inflicted by negligent manufacturers, most of whom are from outside the state. When a North Carolina employee is injured on the job because a machine is defective, the employer, through its workers' compensation carrier, pays the employee for her medical expenses and wage losses. If the six-year statute of repose bars the employee from bringing a third-party claim against the negligent manufacturer, the North Carolina employer and insurance carrier cannot recoup payments they have made to the injured employee. Similarly, the North Carolina Medicaid program cannot recover payments it has made on behalf of the injured person if the statute of repose bars the products liability claim.

Thirty years ago, when the General Assembly enacted the statute of repose, proponents argued that the law was justified because it would benefit North Carolina manufacturers. Changes in the global economy have made that argument obsolete. In 2009, most products that we buy are manufactured outside North Carolina, and most products manufactured in North Carolina are sold elsewhere. As a result, while our statute of repose harms North Carolina citizens, it overwhelmingly benefits out-of-state companies that compete with North Carolina manufacturers.

Elaine's case illustrates the self-destructive irrationality of North Carolina's current law. The SUV that paralyzed Elaine was manufactured in Michigan. Because Michigan has no statute of repose for products liability actions, Michigan residents can sue the manufacturer of a defective product regardless of when or where the product was manufactured or sold. North Carolina's statute of repose thus gives General Motors more protection than the company receives from the state where it provides jobs and pays taxes.

### **Legislative Reform: Enacting a Statute of Repose that Protects North Carolina Citizens and Manufacturers**

The General Assembly needs to act now to give North Carolinians the protection that other American citizens enjoy. The simplest solution would be to follow the lead of the 33 states – including our neighbors, Virginia and South Carolina – that have no statute of repose. Without a statute of repose, a plaintiff could sue the manufacturer of the allegedly defective product regardless of the date of manufacture or initial sale, as long as the plaintiff files suit within the applicable statute of limitations.

If the General Assembly chooses to retain a statute of repose, it should adopt the Nebraska model.<sup>7</sup> Nebraska has a ten-year statute of repose for products manufactured in Nebraska. For products manufactured outside the state, Nebraska uses the statute of repose of the state or country where the product was manufactured – but in no event less than ten years. If the manufacturing state or country does not have a statute of repose, Nebraska will not impose one.

When it amended its statute of repose in 2001, the Nebraska legislature wisely decided that its citizens should receive no less protection than the citizens of the state or country where the defective product was manufactured. At the same time, Nebraska protected its manufacturers by giving them the benefit of its conservative ten-year

statute of repose. A bill modeled on Nebraska's would provide the same kind of protection for North Carolina citizens and manufacturers.

### **Legislative Clarification: Confirming that the Statute of Repose Does Not Apply to Diseases**

From 1986 to 2007, the courts uniformly held that North Carolina's products liability statute of repose does not apply to diseases. In *Wilder v. Amatex Corp.*, the North Carolina Supreme Court considered whether N.C.G.S. § 1-15(b), the predecessor to the 1979 statute of repose, barred a claim for disease caused by exposure to asbestos.<sup>8</sup> Recognizing that occupational diseases such as asbestosis and silicosis do not manifest themselves until many years after exposure to the product, the *Wilder* court concluded that no "injury" occurs until the date the disease is diagnosed.<sup>9</sup> As a result, the ten-year statute of repose in N.C.G.S. § 1-15(b) did not bar the plaintiff's claim.

Soon after *Wilder*, federal courts were asked to determine whether the six-year repose period in N.C.G.S. § 1-50(6), applicable to all claims for "personal injury," included disease-based claims. In *Gardner v. Asbestos Corp.*, Judge Sentelle followed the North Carolina Supreme Court's analysis in *Wilder* and determined that N.C.G.S. § 1-50(6) does not encompass diseases.<sup>10</sup> Two months later, in *Hyer v. Pittsburgh Corning Corp.*, a unanimous panel of the Fourth Circuit Court of Appeals reached the same conclusion.<sup>11</sup> On multiple occasions, the Fourth Circuit reaffirmed its decision in *Hyer*, confirming that North Carolina's statute of repose does not apply to diseases.<sup>12</sup>

When the General Assembly amended North Carolina's Products Liability Act in 1995, it was aware that the courts had uniformly interpreted the products liability statute of repose, N.C.G.S. § 1-50(6), as excluding diseases. If the legislature had wanted to bring diseases within the reach of the statute, it easily could have amended § 1-50(6) to accomplish that objective. By not amending the statute of repose in 1995, the General Assembly implicitly affirmed the Fourth Circuit's interpretation of the statute.

For more than two decades after the Fourth Circuit's decision in *Hyer*, manufacturers, consumers, employees, courts and litigants understood that North Carolina's products liability statute of repose did not apply to actions for damages for diseases. That understanding was recently challenged. In *Klein v. DePuy, Inc.*, a federal district court judge in Indiana interpreted N.C.G.S. § 1-50(a)(6) as including disease-based claims.<sup>13</sup> The Court of Appeals for the Seventh Circuit affirmed, rejecting the Fourth Circuit's analysis.<sup>14</sup>

With the Seventh Circuit departing from what appeared to be settled law, and no opinion from the North Carolina appellate courts directly addressing the issue, it is time for the General Assembly to clarify the law. It would be plainly unfair to deny all legal recourse to individuals afflicted with diseases that cannot be detected until long after their exposure to the dangerous product. The legislature should explicitly state that the statute of repose for products liability actions does not apply to claims arising from diseases. A person who has a disease caused by a defective product should be required to file suit within the time period set by the statute of limitations, with the cause of action accruing when the disease was first diagnosed.

**N**orth Carolina's inflexible six-year statute of repose is the harshest in the nation. The

law punishes North Carolinians injured by defective products while primarily benefitting out-of-state manufacturers. The General Assembly should enact a more equitable statute of repose that protects both North Carolina citizens and North Carolina manufacturers. At the same time, the legislature should make clear that the products liability statute of repose does not apply to diseases. ■

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<sup>1</sup> N.C.G.S. § 1-50(a)(6) was previously § 1-50(6). This article uses the two citations interchangeably.

<sup>2</sup> Alabama, Alaska, Arizona, Arkansas, California, Delaware, District of Columbia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming.

<sup>3</sup> Connecticut (10 years) (Conn. Gen. Stat. § 52-577a); Idaho (10 years) (Idaho Code § 6-1403); Kansas (10 years) (Kan. Stat. Ann. § 60-3303); Washington (12 years) (Wash. Rev. Code § 7.72.060).

<sup>4</sup> Colorado (10 years) (Colo. Rev. Stat. § 13-21-403(3)); Kentucky (five years from date of first sale to consumer or eight years from date of manufacture) (Ky. Rev. Stat. § 411.310).

<sup>5</sup> Florida (12 years) (Fla. Stat. § 95.031(2)(b)); Georgia (10 years) (Ga. Code § 51-1-11(b)(2)); Illinois (10 or 12 years) (735 ILCS 5/13-213(b)); Indiana (10 years) (Ind. Code § 34-20-3-1); Iowa (15 years) (Iowa Code § 614.1(2a)); Nebraska (at least 10 years) (Neb. Rev. Stat. § 25-224); Ohio (10 years) (Ohio Rev. Code § 2305.10(C)(1)); Oregon (10 years) (Or. Rev. Stat. § 30.905); Tennessee (10 years) (Tenn. Code § 29-28-103); Texas (15 years) (Tex. Civ. Prac. & Rem. Code § 16.012).

<sup>6</sup> In 1985, the North Carolina Supreme Court rejected a challenge to the constitutionality of N.C.G.S. § 1-50(6) in *Tetterton v. Long Manufacturing Co.*, 314 N.C. 44, 332 S.E.2d 67 (1985). For a thorough discussion of the constitutional issues, see Patrick, *The Products Liability Statute of Repose: Questioning the Constitutional Foundations*, TRIAL BRIEFS (May 2002) at 23.

<sup>7</sup> Neb. Rev. Stat. § 25-224.

<sup>8</sup> *Wilder v. Amatex Corp.*, 314 N.C. 550, 336 S.E.2d 66 (1985).

<sup>9</sup> 314 N.C. at 560, 336 S.E.2d at 72.

<sup>10</sup> *Gardner v. Asbestos Corp.*, 634 F. Supp. 609 (W.D.N.C. 1986).

<sup>11</sup> *Hyer v. Pittsburgh Corning Corp.*, 790 F.2d 30 (4th Cir. 1986).

<sup>12</sup> *Bullard v. Dalkon Shield Claimants Trust*, 74 F.3d 531 (4th Cir. 1996); *Guy v. E.I. DuPont de Nemours & Co.*, 792 F.2d 457 (4th Cir. 1986); *Silver v. Johns-Manville Corp.*, 789 F.2d 1078 (4th Cir. 1986).

<sup>13</sup> *Klein v. DePuy, Inc.*, 476 F. Supp. 2d 1007 (N.D. Ind. 2007).

<sup>14</sup> 506 F.3d 553 (7th Cir. 2007).